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Tracking Doe; Texas Supreme Court Decisions Seek to Interpret Parental Notification Law



he 76th Legislature enacted S.B. 30, adding Chapter 33 to the Texas Family Code, which prohibits a physician from performing an abortion on an unemancipated minor unless the physician has first given at least 48 hours' notice to the minor's parent or quardian. Chapter 33 also provides a procedure allowing a minor to judicially bypass the parental notification requirement. Since January 2000, the Texas Supreme Court has heard six appeals regarding denials of a minor's application to judicially bypass notification, requiring the court to interpret the language of the statute. The court has often been divided, and the exchanges between the justices have been ardent, and, at times, acrimonious. However, a majority has agreed on what evidence a minor must present to demonstrate that she is mature and sufficiently well informed to make the decision to have an abortion performed without notification; a majority has also set the standards a trial court should follow when determining whether parental notification would not be in a minor's best interest. Dissenting justices have argued that the standards set by the majority are too low, undermine parental rights, and ignore legislative intent.

This brief is in three parts. The first part summarizes the parental notification law. The second part discusses the majority decisions regarding the interpretation of Chapter 33 and issues that are still unresolved, and the final part contains summaries of each of the six decisions.





PARENTAL NOTIFICATION LAW

Under Chapter 33, a minor may file with a court an application seeking an order bypassing the parental notification requirement. The trial court must determine by a preponderance of the evidence whether:

- the minor is mature and sufficiently well informed to make the decision to have an abortion performed without notification;
- notification would not be in the best interest of the minor; and
- ◆ notification may lead to physical, sexual, or emotional abuse of the minor.

If the court makes any of these findings, the court must authorize the minor to obtain an abortion without notification to either of her parents or a guardian. Chapter 33 also creates an expedited, confidential judicial process for hearing the application and appealing the denial of the application.

TEXAS SUPREME COURT

Majority Rulings

All the justices have agreed that even though Chapter 33 seeks to protect the minor's anonymity and the confidentiality of the judicial bypass procedure, these provisions do not prevent the supreme court from publishing its decisions. As the state's highest civil court, the supreme court is obligated to provide guidance to the lower courts through its published opinions. Also, publishing its decisions alerts citizens as to how the court has interpreted the law, giving the people and their elected officials an opportunity to change the law in light of the way the judiciary has interpreted and applied it.

Regarding other issues arising under Chapter 33, a majority of six justices has:

◆ ruled that a minor has established that she is mature and sufficiently well informed to make the decision to have an abortion performed without notification pursuant to Chapter 33 when the evidence demonstrates that she is capable of reasoned decision-making and her decision is not impulsive, but based on careful consideration of the various options available to her and the benefits, risks, and consequences of these options. While the trial court must take into account the totality of the circumstances surrounding the minor in determining whether she is mature and sufficiently well informed in order to bypass parental notification, at a minimum the minor must establish that she:

- has obtained information from a health-care provider about the health risks associated with abortion and understands those risks, including an understanding of the risks associated with the particular stage of her pregnancy;
- understands the alternatives to abortion and their implications. She must demonstrate that she is fully apprised of her options, including adoption and keeping the child, and has given thoughtful consideration to these alternatives. She must also understand that the father is legally required to financially support the child. However, the minor cannot be required to justify her decision to choose abortion over the other alternatives; and
- is aware of the emotional and psychological aspects of undergoing abortion, which can be severe for some women. She must show that she has considered how the decision might affect her relations with her family. Although the minor does not have to obtain this information from licensed professional counselors, she must show that she obtained the information from reliable sources of her choosing, enabling her to make a thoughtful and informed decision.
- ♦ set the standards a trial court should follow when determining whether parental notification would not be in a minor's best interest. This encompasses a broad interest for the minor's welfare and weighs the disadvantages and advantages of parental notification within the minor's specific situation. A minor's generalized fear of telling her parents does not, by itself, establish that notification would not be in her best interest. Factors that the trial court must look at in making such a determination are:
 - the minor's emotional and physical needs;



- the possibility of emotional or physical danger to the minor;
- the stability of the minor's home and whether notification would cause serious and lasting harm to the family structure; and
- the relationship between the parent and the minor and the effect of notification on that relationship.

This list of factors is not exhaustive, and a court should consider all the relevant circumstances.

- held that a trial court must make specific findings regarding the three statutory requirements (the minor's maturity, best interest, and potential for abuse). If such determination is based on its assessment of the minor's credibility, the trial court should make specific findings on that issue as well.
- ◆ concluded that when a trial court fails to make a finding under Chapter 33, that failure will be resolved in the minor's favor, provided that she has presented evidence at trial regarding that element.
- ◆ declared that, in determining whether a minor is mature and sufficiently well informed, the trial court must consider whether the minor has thoughtfully considered her alternatives as concerns her specific situation, choices, and options. The fact that a minor does not share the trial court's views about the benefits of alternatives to an abortion or chooses not to pursue those alternatives does not mean that she has not given those alternatives thoughtful consideration. Any generally recognized benefits to an alternative must be considered in light of the minor's particular situation.
- agreed, in one case, with the lower court's denial of the waiver of parental notification. However, in another decision, the majority ruled to allow a minor to undergo an abortion without first notifying her parents.

In the last of the six appeals, a majority noted that the legislature, in creating the bypass procedure, specifically enumerated the grounds that would require a court to grant an order waiving parental notification and set the level of proof required in order for a minor to obtain such waiver. Although the legislature could have

imposed more stringent standards, it instead set the level of proof at "preponderance of the evidence." The court could not set a higher or different standard and was limited to reasonably interpreting that standard set by the legislature.

Also, in this final case, the author of the legislation creating Chapter 33 and sponsors of the act, joined by other legislators, had filed an amicus brief discussing the legislative intent and suggesting that the court's prior decisions interpreting Chapter 33 did not set a high enough standard. However, the majority ruled that a brief by certain legislators discussing legislative intent behind this law is not statutory history, provides little guidance as to what the legislature collectively intended, and courts, when construing statutory language, should give little weight to post-enactment statements by legislators. The legislature may amend the statute if it believes the court has misinterpreted the law.

No Majority Decision

Although the issue of when a minor had established that notifying her parents could lead to physical, emotional, or sexual abuse was considered by the court, there was no majority consensus. Emotional abuse is not defined in Chapter 33. However, Section 261.001 of the Family Code defines abuse as including mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning. Two justices held that the definition of abuse contained in Section 261.001 does not define abuse as used in Chapter 33 but, extrapolating from that definition and other similar statutes defining abuse, declared that emotional abuse contemplates unreasonable conduct causing serious emotional injury. The courts, the two stated, have the difficult task of differentiating between a minor who merely wants to avoid parental disapproval from one who is at risk of serious emotional injury, but the justices gave little guidance. Evidence of prior emotional or physical abuse in the home which resulted in the minor becoming severely depressed and selfdestructive, if causally linked to notification, would establish the risk of such abuse.

Two other justices would employ the definition of abuse contained in Section 261.001, which requires that the





abuse be observable and material and impair the child's growth, development, or psychological functioning. However, four justices asserted that Section 261.001 was not meant to apply to Chapter 33. They noted that under Chapter 33 a court must enter an order allowing a minor to obtain an abortion without parental notification if the court finds that notification may lead to abuse. There is no requirement that the court weigh the severity of the abuse or require the minor to prove more, such as serious emotional injury or a material impairment in the child's growth, development, or psychological functioning.

CASE SUMMARIES

In re Jane Doe 1: February 25, 2000

In this first case, Doe was a pregnant unemancipated minor living with her parents and was only months away from her 18th birthday. All the justices agreed that even though the law contains many provisions designed to protect the minor's anonymity and the confidentiality of the judicial bypass procedure, this did not prevent the supreme court from making its decision public. In this first case, six of the nine justices set out when a minor had established that she is mature and sufficiently well informed to consent to an abortion without parental notification. The evidence must demonstrate that the minor is capable of reasoned decision-making and that her decision is not the result of impulse, but is instead based on careful consideration of the various options available to her and the benefits, risks, and consequences of these options. Looking to decisions in other states that have interpreted similar parental notification, the six concluded that the trial court must take into account the totality of the circumstances surrounding the minor in determining whether she is mature and sufficiently well informed in order to bypass parental notification. At a minimum, the minor must establish that she has obtained information from a health-care provider about the health risks associated with abortion and understands those risks: understands the alternatives to abortion and their implications; and is aware of the emotional and psychological aspects of undergoing abortion, which can be severe for some women.

The majority also set out some criteria that should not be relied on as conclusively establishing immaturity, such as age. Educational background, school performance, or participation in extracurricular activities are not conclusive on the issue of maturity, and socioeconomic status should not bear on the decision. Because this was a case of first impression and the court was announcing guiding legal principles to be followed by the trial courts, the justices agreed to remand the case to the trial court for further proceedings, even though there was no provision for remand in either the statute or the rules promulgated by the court pursuant to the statute.

Two justices dissented, asserting that the requirements set by the majority for determining whether a minor was mature and sufficiently well informed were so minimal as to undermine the legislature's intent. Most minors, declared the dissent, would be able to meet those requirements with the assistance of counsel. The dissent asserted the law required a more substantive showing, implying that a minor should be required to show that she had received counseling prior to making her decision and was fully aware of the profound consequences her decision could have on her relationship with her family and on future relationships.

In re Jane Doe 2: March 7, 2000

This case concerned an unemancipated 16-year-old minor living at home with her parents. Six of the justices joined in the majority opinion, with one justice concurring in the judgment and two dissenting. The court remanded the case so that the trial court could determine whether the minor was mature and sufficiently informed in accordance with the standards set forth in Doe 1.

In this case, the appellant asserted that notification would not be in her best interest. The majority set out the four factors a trial court must consider when making this best interest determination. The majority, noting that other jurisdictions have looked at whether notification might cause the parents to withhold emotional or financial support of the minor, declared that the four-factor list was not exhaustive and that a court should consider all the relevant circumstances. However, a minor's generalized fear of telling her



parents does not, by itself, establish that notification would not be in her best interest. The trial court must make specific findings about its determination that a minor has not shown that notification would not be in her best interest and, if this determination is based on its assessment of the minor's credibility, specific findings on that issue as well.

The appellant had also asserted that notifying her parents might cause them to physically or emotionally abuse her, testifying that her father had a temper and had slapped, but never beaten, her. The trial court had held that there was no evidence of the potential for abuse. Although the majority found that this testimony was not conclusive, it did not support the trial court's ruling. The trial court was instructed, on remand, to make specific findings concerning the potential for abuse, and if the court found the minor's testimony not credible, make specific findings regarding her credibility.

One justice, while concurring in the judgment, asserted that the majority had failed to give effect to the legislature's intent by failing to require a trial court to determine by preponderance of the evidence not only that parental notification would not be in the minor's best interest, but also that having an abortion would be in the minor's best interest. Two dissented, asserting that the best interest standard set by the majority was too low and undermined legislative intent to protect parental rights.

In re Jane Doe 3: March 10, 2000

The main issue in this case was when a minor had established that notifying her parents could lead to physical, emotional, or sexual abuse, which would authorize a court to issue an order allowing the minor to obtain an abortion without parental notification. The minor expressed concern that if her parents were notified that her father, an alcoholic, would became "physical" with her mother and that she herself would be subjected to emotional abuse. It was in this case that the court was divided on how to define emotional abuse as regards paternal notification, and no judgment was rendered on this issue. However, because six justices did vote to set aside the lower court judgment, the matter was remanded to the trial court for further proceedings.

One justice dissented, again asserting that the court was setting too low the standards that would allow a minor to bypass parental notification and stating he would have upheld the lower court decision denying the waiver of parental notification. A second justice, while concurring with the dissent, issued a separate dissent emphasizing that the trial court, not the supreme court, is the finder of fact and that the supreme court is limited to reviewing those findings under the legal sufficiency standard.

In re Jane Doe 4: March 22, 2000

In her application for judicial bypass, the minor alleged that she met all the requirements for waiver of parental notification under Chapter 33. At trial, Doe was the only witness. The trial court denied her application, ruling that she was not mature and sufficiently well informed to make the decision to have an abortion performed without notification to either of her parents; that notifying either parent would be in her best interest; and that notifying either parent would not lead to her being physically, sexually, or emotionally abused.

Regarding the minor's claim that she was mature and sufficiently well informed, the majority noted that her testimony was very limited, consisting almost entirely of monosyllabic answers to conclusory questions posed by her counsel and held that this evidence fell short of the three showings required in Doe 1. However, because Doe 1 was issued on the same day as the trial court hearing on her application, the majority remanded the case to the trial court to afford Doe an opportunity to present evidence that she is mature and sufficiently well informed in light of Doe 1.

The minor also asserted that the trial court erred in failing to find that notification would not be in her best interest, claiming that notifying her parents that she was pregnant and wanted an abortion would lead her parents to expel her from their home and sever all ties with her. Citing Doe 2, which established a non-exhaustive list of four factors for courts to consider in determining a minor's best interest, the majority reviewed the trial court's determination about whether notification would not be in the minor's best interest.

The majority stated that, as a matter of law, the minor's emotional well-being, the family structure, and the





parent-child relationship would be adversely affected if her parents withdrew support and severed all contact with her. If the minor's uncontroverted testimony in this regard was clear, positive, and direct and not impeached or discredited by other circumstances, the trial court would have to accept it as fact and it would be an abuse of its discretion if it then denied the minor's application. However, the majority also noted that because a trial court can view a witness's demeanor, it is given great latitude in believing or disbelieving a witness's testimony, particularly when the witness is interested in the outcome. Therefore a trial judge can reject the uncontroverted testimony of a minor in such proceedings unless it is clear, positive, and direct and there are no circumstances tending to discredit or impeach it.

Doe had testified that some years ago, her sister, at age 17 or 18, found herself in a similar situation. After the sister told their parents, the parents expelled the sister, and neither the parents nor Doe had spoken to the sister since. Doe stated that she believed that her parents would treat her the same way if notified that she was pregnant and seeking an abortion. While the majority stated that Doe's testimony appeared to be direct and positive and was not self-contradictory or otherwise suspect, it did not clearly establish that the minor's parents would abandon her and cut off all contact if they were notified. The majority reasoned that the brief testimony left many questions unanswered because it did not cover whether other problems may have contributed to her parents' decision to expel her sister, said nothing about Doe's relationship with her parents, which may be quite different from her sister's, and was not clear as to whether her parents, her sister, or both are responsible for their long estrangement. Because Doe's testimony did not elaborate on the circumstances surrounding the rift between her sister and her parents, the majority held that there was not clear evidence that the minor would suffer the same fate as her sister should she tell her parents. Therefore, the trial court did not abuse its discretion by failing to find that notification would not be in Doe's best interests.

The majority declared that because Doe did not establish as a matter of law that she was mature and sufficiently well informed or that notification would not be in her best interest, the supreme court could not render judgment granting her application. However, the majority remanded the case to the trial court for another hearing in light of Doe 1 and Doe 2.

Three justices dissented, arguing that the lower court's denial of Doe's application should have been affirmed. One of these justices, in a separate dissent, again argued that the majority had set too low a standard for judicial bypass, undermining parental rights.

In re Jane Doe 4: April 11, 2000

After the supreme court remanded Doe 4, the trial court again denied Doe's application to bypass parental consent, and Doe appealed. In affirming the lower court's decision, seven justices joined in the majority opinion ruling that, based on the record, the trial court had not abused its discretion in failing to find that a judicial bypass was in Doe's best interests. The remaining two justices joined in a concurring opinion.

Doe argued that she had established as a matter of law that she was mature and sufficiently well informed to have an abortion without notifying her parents and that notification would not be in her best interest. Citing Doe 1 regarding the three showings a minor must make to establish that she is mature and sufficiently well informed, the majority held that Doe failed to establish the first showing (that she had obtained information from a health-care provider about the health risks associated with abortion and that she understood those risks). Doe had testified she had spoken to a doctor and, because of a past medical problem, she would have to undergo a different type of abortion procedure involving different anesthesia and resulting in different risks. But she was unable to explain how or in what way the procedures and risks would be different, demonstrating, the majority stated, a lack of comprehension about the specific risks of the procedure to her. Her testimony therefore did not demonstrate as a matter of law that she understood the risks of having an abortion.

Regarding whether notification would not be in her best interests, the court cited Doe 2 concerning the factors a trial court must consider in making this best interests determination, which include whether notification may lead the parents to withdraw emotional and financial support from the minor. Doe had offered two reasons



why it would not be in her best interest to notify her parents. First, she testified that a medical condition for which she was treated in years past led her physician to advise that having children would be risky and not in her best interest. The majority declared that while Doe's pre-existing medical problems may be probative of why an abortion may be in her best interest, under Section 33.003 she must prove by a preponderance of the evidence that notifying her parents would not be in her best interest. If there is a health risk, the court stated this may weigh in favor of involving her parents in her decision.

Doe also testified that notifying her parents could cause her parents to cut off all financial and emotional support once they learn of her pregnancy. She stated that when her sister was in the same situation a number of years earlier, her parents immediately ordered the sister to leave the home, even though the sister was still a minor, and have not spoken to the sister since. This type of potential disruption to Doe's family relationship, noted the majority, may weigh against notifying her parents. Considering all the circumstances, the majority found that some of the evidence weighed in favor of Doe having to notify her parents, while other evidence weighed against notification. Noting that the factors listed in Doe 2 are not exhaustive and that the trial court must consider all relevant circumstances in making a best interest determination, the majority found that the trial court could have determined that Doe's particular physical needs and the possibility of physical danger outweighed any potential disruption to Doe's family relationship.

Two justices concurred in the judgment but again asserted that the majority continued to demonstrate antipathy to the purposes of Chapter 33, setting too low the standards that would allow a minor to judicially bypass the parental notification requirement.

In re Jane Doe 5: June 22, 2000

In this most recent decision regarding Chapter 33, six justices ruled to allow a minor to undergo an abortion without first notifying her parents. In this case, Doe was seeking to obtain judicial bypass on the grounds that she was mature and sufficiently well informed to

make the decision to have an abortion performed without notification. The trial court had ruled that Doe had failed to prove by a preponderance of the evidence that she was sufficiently well informed to obtain an abortion without parental notification but failed to make any findings regarding her maturity. The majority of the supreme court held that when a trial court fails to make a finding under the Act, that failure will be resolved in the minor's favor, provided that she has presented evidence at trial regarding that element. In this case, the majority found that Doe had presented evidence of her maturity during trial.

The trial court held that Doe had not thoughtfully considered her alternatives because it concluded that she did not understand the intrinsic benefits of keeping the child or adoption. The majority reversed, declaring that the focus of the inquiry must be on whether the minor has thoughtfully considered her alternatives as concerns her specific situation, choices, and options. The fact that a minor does not share the trial court's views about the benefits of alternatives to an abortion or chooses not to pursue those alternatives does not mean that she has not given those alternatives thoughtful consideration. Any generally recognized benefits to an alternative must be considered in light of the minor's particular situation.

A majority noted that the legislature, in enacting Chapter 33, had set out the grounds for waiver of parental notification and level of proof (preponderance of the evidence) required in order to obtain a waiver; the court was limited to interpreting the standard set by the legislature and could not set a higher or different standard.

In this case, the author of the legislation creating Chapter 33 and other legislators had filed an amicus brief discussing the legislative intent and suggesting that the court's prior decisions interpreting Chapter 33 did not set a high enough standard. However, the majority rejected this brief, ruling that it was not statutory history and provided little guidance as to the legislature's collective intent and that post-enactment statements by legislators should be given little weight in construing the statutory language. If the legislature believes the court has misinterpreted the law, the majority stated, the legislature can amend the statute.





The majority had granted Doe's application, with notice that published opinions would follow. The majority stated that this was proper because the record indicated that Doe was entitled to a bypass and that any further delay might expose her to greater risk and could require a more complicated and invasive abortion procedure. Also, the majority declared, additional delay might have called into question whether the proceedings were sufficiently expeditious to pass constitutional muster.





Three justices dissented. One asserted that the court should adhere to the brief regarding legislative intent and the interpretation of Chapter 33. Another agreed that the majority, by rejecting the brief, was disregarding legislative history and intent and challenged the decision to first issue judgment before publishing the accompanying opinion. The third dissenting justice agreed that the court had acted hastily in rendering judgment prior to issuing the opinion and asserted that the majority had violated the rule that any omitted findings of fact by a lower court must be construed as supporting the judgment.

—by Sharon Hope Weintraub, SRC



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